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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. MAURO ALVAREZ LOPEZ, JR., Defendant and Appellant.	C075373 (Super. Ct. No. MF034003A)

Appointed counsel for defendant Mauro Alvarez Lopez, Jr., has asked that we review the record to determine whether there exist any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant has filed a supplemental brief. Finding no merit in defendant's arguments, and no arguable error that would result in a disposition more favorable to him, we shall affirm the judgment.

BACKGROUND

Defendant was convicted of molesting M.D., his own daughter, and T.D., his wife's sister's daughter.

T.D.

T.D. was born in August 1996. Her mother is V.H. V.H.'s sister was married to defendant. In 2004, when T.D. was seven or eight years old, she and her younger sister lived with defendant and his family for less than a month. They shared a room with defendant's daughter M.D. Defendant would come into the room and lock the door when T.D. was there and her aunt was out of the house. On more than one occasion, defendant would pick T.D. up, pull down her pants, and insert his fingers into her vagina, moving them around. More than once, defendant tried to put his penis inside her vagina.

When T.D. started sleeping in the master bedroom, defendant would enter, lock the door, grab her by the hair, and force her to orally copulate him. T.D. tried to push away and told him to stop, but defendant would hit her on the back of the neck if she did not obey. Defendant did this to her more than once. Defendant would force T.D. to go swimming so he could put his hand inside T.D.'s swimsuit and touch her vagina while giving her a piggyback ride. Other times, defendant would insert his fingers into her vagina after forcing her to go swimming.

T.D. was scared about the sexual assaults and knew they were wrong, but did not know how to deal with it. Defendant told her no one would believe her if she said anything. She was always crying and scared while living at defendant's house. V.H. soon moved the girls to live with their grandparents in Atwater.

V.H. moved her family back with defendant and his family in the summer of 2011. V.H. saw that T.D. was upset and did not want to move back into defendant's home. T.D. did not want to go because of the prior molestations. She did not tell this to anyone because she was afraid, instead saying she did not want to move to another school.

In August, 2011, while her family was staying at defendant's house, defendant put his hand under T.D.'s shirt and started playing with her breasts. Defendant left when T.D. threatened to call her mother if he did not leave.

T.D. told M.D. about the molestations. M.D. then told T.D. that she believed her, as defendant was touching her breasts also. M.D. told their grandmother and T.D. told V.H. The girls later spoke to the police.

M.D.

M.D. was born in August 1991. Defendant, her father, molested her when she was 10 years old (in approximately 2001). The first time defendant touched her was in the living room, where he touched her breasts while they were sitting on the floor. He touched her breasts more than one time. Another time, defendant bit her breast. He put his fingers in her vagina multiple times. Once, he touched her vagina in the pool during a piggyback ride.

Defendant

Defendant presented evidence at trial from various family members that they did not observe anything wrong in his family and did not see defendant behave inappropriately with various young female family members.

Proceedings

Following two jury trials, the first of which resulted in a finding of guilty on one count only and no verdicts on the remaining charges, defendant was convicted of one count of lewd acts upon a child under 14 years where defendant was at least 10 years older (Pen. Code, § 288, subd. (c)(1)),[1] eight counts of lewd acts on a child under 14 (§ 288, subd. (a)), and three counts of aggravated sexual assault on a child under 14 (§ 269, subd. (a)), along with multiple victim (one strike) and substantial sexual conduct enhancements (former § 667.61, subd. (e)(5), § 1203.066, subd. (a)(8)). The trial court sentenced defendant to an aggregate state prison term of 165 years to life, imposed

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[1] Further undesignated statutory references are to the Penal Code.

various fines and fees, and awarded 823 days of presentence credits (716 actual and 107 conduct). Defendant appeals.

DISCUSSION

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests that we review the record and determine whether there are any arguable issues on appeal. (*Wende*, *supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief, and he filed a supplemental brief raising four issues.[2] We state his contentions verbatim as they are difficult to couch in legal terms.

His first contention is, "[w]here is the evidence from the doctor in the doctor's file." There is no doctor's file in the appellate record; we interpret defendant's contention to claim insufficient evidence supports his convictions given the absence of any medical evidence supporting the victims' testimony. We skip to defendant's third contention and address this together with his first, as our analysis and response will be the same. His third contention is, "[w]here are the school's files." There is no "school file" in the appellate record; again, we interpret his contention to claim insufficient evidence supports his convictions given the absence of any evidence from the school supporting the victims' testimony. In the absence of any citations to the record and any argument detailing any perceived deficiencies in the evidence, we have nonetheless reviewed the record and conclude that the testimony from the two victims presented at trial was more than sufficient to sustain all counts of conviction. (See, e.g., *People v. Barnes* (1986) 42 Cal.3d 284, 303 [credibility determinations for trier of fact]; *People v. Johnson* (1980) 26 Cal.3d 557, 576 [all conflicts resolved in favor of judgment]; *People v. Watts* (1999)

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[2] Defendant's supplemental brief was written in Spanish. His appellate counsel provided a translation for the court, which we have independently verified.

76 Cal.App.4th 1250, 1258-1259 [single witness sufficient, whose inconsistency or uncertainty is for trier of fact to resolve].)

Defendant's second contention is, "[w]hy did they wait ten years to condemn me," which we interpret as raising a statute of limitations claim. The earliest crimes committed by defendant were alleged to have taken place in August 2001. The statute of limitations for all offenses was tolled when the information was filed on April 25, 2012. Aggravated sexual assault of a child carries a life term (§ 269, subd. (b)) and therefore may be prosecuted at any time (§ 799). Section 801.1, subdivision (a) states that prosecution of various sex offenses, including section 288, subdivision (a), "may be commenced any time prior to the victim's 28th birthday" if the crime "is alleged to have been committed when the victim was under the age of 18 years." This subdivision was added to section 801.1, effective January 1, 2006. (Stats. 2005, ch. 479, § 2, pp. 3790-3791.) T.D. was 17 at the time of the trial and M.D. was 22 at the time of the trial. Since the statute of limitations had not run by the effective date of section 801.1, defendant could be prosecuted on the lewd act counts. (*People v. Simmons* (2012) 210 Cal.App.4th 778, 787-788.)

Defendant's final contention is, "[t]hey did not want to give me a new trial." We interpret this as a challenge to the denial of his motion for new trial.

Defendant filed a motion for new trial after his second trial, asserting "[i]nstructional error," "Ex Post Facto application of Penal Code section 667.61," and "[i]nsufficiency of the evidence." Defendant's sentencing memorandum pointed out that the information alleged the wrong one strike enhancement, section 667.61, subdivision (e)(4), because at the time defendant committed his crimes (2001 to 2004) that provision applied only to sex offenses where the defendant personally used a dangerous or deadly

weapon.[3] (See former § 667.61, subd. (e)(4).) The new trial motion alleged "instructional error" based on the fact that the jury had been instructed using this incorrect statutory designation, and also ex post facto application of that same code section, as explained immediately *post*.

The information alleged defendant was subject to the multiple victim sentencing scheme of the one strike law in violation of section 667.61, subdivision *(e)(4)*. At the time of defendant's crimes, the multiple victim allegation was contained in subdivision *(e)(5)* of section 667.61; this provision was reenacted without change as section 667.61, subdivision (e)(4) in 2011. (Stats. 2011, ch. 361, § 5.) After the second trial, the People moved to amend the information to conform to the relevant version of the one strike law in effect when defendant committed the offenses, former section 667.61, subdivision (e)(5). Defendant argued that amending the motion would subject him to ex post facto punishment. The trial court rejected the contention and granted the People's posttrial motion to amend the information.

The ex post facto contention and corresponding instructional error claim raised in the new trial motion lack merit. Amending the information to conform to correct code provision and proof submitted at trial did not subject defendant to an ex post facto punishment, but instead simply corrected an error in the information. (See *People v. Thomas* (1987) 43 Cal.3d 818, 826 [error in identifying the relevant statute is a defect in pleading].) Since the information alleged from the beginning of his case that defendant was subject to the multiple victim portion of the one strike law, he was not prejudiced by this defect in the information, and therefore the error in the pleading was harmless. (*Id.* at pp. 826-827; § 960 ["No accusatory pleading is insufficient, nor can the trial,

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[3] The memorandum also claimed the one strike law did not apply to section 288, subdivision (a) when defendant committed his crimes between 2001 and 2004. This is wrong. (See former § 667.61, subd. (c)(7).)

judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits"].) Further, the jury was properly informed of the substance of the charges and enhancements in the instructions and verdict forms as given. The fact that the subdivision of the applicable code section was one number off due to a change in numbering that occurred after defendant's crimes but before he was charged is of no moment.

We have separately addressed the sufficiency of the evidence claim *ante* and found the evidence sufficient to sustain defendant's convictions.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

HULL, Acting P. J.

MAURO, J.